Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

COMMENTS OF AFFILIATED
REGIONAL COMMUNICATIONS, LTD.

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SUMMARY

The Commission should recognize the marketplace differences between residential and commercial cable subscribers and permit different rate structures for those customer classifications. The regional programming services managed by Affiliated Regional Communications, Ltd. ("ARC") charge cable operators and other distributors higher license fees for distribution of those services to commercial establishments. ARC's commercial license fees are based on the size of the "Estimated Viewing Area" in each commercial establishment authorized to receive its programming (i.e. the area within which patrons of the establishment can reasonably view the service).

ARC charges higher license fees for distribution of its programming to commercial establishments because:

- Professional sports teams seeking to protect the "gate" for their home games have authorized commercial distribution in return for a share of the higher commercial license fees or a higher general rights fee.
- Commercial customers use ARC's programming to attract customers and enhance revenues, thereby receiving value from ARC's programming services beyond the value received by residential customers.
- Higher commercial rates enable ARC to compensate in part for revenues lost when individuals choose to view ARC's programming at such establishments rather than to subscribe to ARC's services.

Other licensing arrangements expressly distinguish between residential and commercial customers. For example, the National Football League and ESPN have announced that their commercial rates for satellite reception of "out-of-market" professional and collegiate football games will be based on a formula

substantially similar in structure to ARC's "Estimated Viewing Area." Home satellite dish programming packagers also charge higher rates to commercial customers. Finally, longstanding copyright law similarly distinguishes between private and "for profit" public performances at commercial establishments such as bars, restaurants, hotels and shopping malls.

The marketplace differences and other relevant licensing arrangements demonstrate that commercial subscribers represent a reasonable customer classification permitted under the 1992 Cable Act. Moreover, there is no empirical support for regulations mandating equivalent commercial and residential rates and such regulations may undermine important objectives of the 1992 Cable Act. Consequently, the Commission should not require uniform residential and commercial cable rates and should expressly permit cable operators to charge commercial subscribers higher rates to reflect the higher fees imposed by programming services for commercial distribution, as well as the lost subscriptions and revenues from public display of the services.

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Affiliated Regional Communications, Ltd. ("ARC") submits these comments in response to the Commission's Fifth Notice of Proposed Rulemaking in this proceeding.[1] Commission rules or policies which generally would prohibit cable operators from charging commercial entities higher subscription rates than residential customers would ignore fundamental marketplace differences and undermine several important Congressional objectives identified in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").

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[1] See, Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38 (rel. Mar. 30, 1994) ("Second Order," "Fourth Report" and "Fifth Notice").

Introduction

In its Second Order in this proceeding, the Commission stated that it was "not persuaded" to authorize "special, presumably higher, rates for regulated cable services provided to commercial establishments." Second Order at ¶185. Specifically, the Commission concluded that neither the 1992 Cable Act nor its legislative history "evinced an intent" that commercial establishments should pay higher rates. Id. However, the Commission expressed a willingness to consider proposals for higher commercial rates on a case-by-case basis and anticipated that such proposals might be acceptable "if the higher commercial earnings were offset by savings to [residential] subscribers." Id. The Commission then decided to "further explor[e] this issue" in the Fifth Notice. Id. at ¶¶185, 257.

ARC respectfully suggests that in reaching its tentative conclusions, the Commission has placed undue emphasis on reducing residential cable rates and has overlooked several important objectives of the 1992 Cable Act. For example, in Section 2 of the 1992 Cable Act, Congress identified the protection of "consumer interests" in cases "where cable television systems are not subject to effective competition" as its fourth objective -- after: (a) promoting "the availability to the public of a diversity of views and information;" (b) relying "on the marketplace, to the maximum extent feasible, to achieve that availability;" and (c) ensuring that "cable operators continue to expand, where economically justi-

fied...the programs offered over their cable systems." 1992 Cable Act, §2(b). However, the Commission's tentative conclusion that cable operators generally may be prohibited from charging higher rates to commercial establishments such as sports bars and restaurants ignores competitive marketplace forces and is likely to limit cable distribution of certain programming, particularly regional sports programming.

I. Higher Commercial Rates Result From Differences Between Residential And Commercial Customers.

ARC and/or its predecessors have provided regional cable sports programming to cable operators and other multichannel video programming distributors since 1983. The cornerstones of ARC's regional sports networks are rights agreements with one or more professional sports teams in various regions, pursuant to which ARC receives the rights to distribute certain games featuring those teams. Unlike other types of programming which have "continuous audience appeal, sports events have substantial entertainment value only at the time of their occurrence." Regulations Pertaining To The Showing Of Sports Events On Over-The-Air Subscription Television Or By Cablecasting, 52 F.C.C.2d 1, 57 (1974), on recon. 54 F.C.C.2d 797 (1975), set aside on other grounds sub nom. Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). Having paid substantial fees for the rights to televise certain games, ARC seeks to maximize its revenues from the distribution of those games to consumers.

As a result, ARC traditionally has differentiated between residential customers who subscribe to ARC's programming services for their own private viewing, and commercial establishments such as sports bars and restaurants, which show ARC's programming services to their paying customers. Whether distributed by cable, SMATV, MMDS, or home satellite dish ("HSD"), ARC charges the distributor higher programming fees for distribution to commercial establishments.

ARC's fees for commercial establishments are based on the "Estimated Viewing Area" of each establishment. The Estimated Viewing Area is determined by multiplying the capacity of the establishment (usually based on the applicable fire code) by a fraction, the denominator of which is the total square footage of the establishment while the numerator is the square footage of the area where patrons of the establishment can reasonably view the service. ARC's charges to the distributor increase as the Estimated Viewing Area of the commercial establishment increases.[2]

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[2] Generally, ARC charges the distributor, which in turn charges each commercial customer. In the alternative, ARC's regional services may enter into licensing agreements directly with those commercial establishments desiring to receive ARC's programming. In such cases, the commercial establishment pays a license fee directly to the regional sports network, and the network pays the cable operator a fee to deliver the signal to each establishment.

A. Programmers And Other Rights Holders Reasonably Require Higher License Fees For Commercial Distribution.

There are several reasons why ARC charges higher rates for distribution of its programming to commercial establishments such as sports bars and restaurants. First, as the Commission has recognized, professional sports teams have a significant interest in protecting the "gate" for their home games, which in most cases constitute the majority of games licensed to regional cable sports networks. See, e.g., Interim Report on Sports Programming Migration, 8 FCC Rcd. 4875 (1993), at ¶39. Consequently, early agreements between ARC's regional cable sports services and professional teams prohibited or otherwise restricted distribution of licensed games to commercial entities because teams sought to encourage fans to watch home games at the ballpark rather than their local bar or restaurant. Eventually, teams authorized distribution of their home games to commercial entities pursuant to rights agreements which expressly required ARC to charge higher rates to commercial establishments, allowed the teams to share in commercial license fees, and/or substantially increased general rights fees for the teams. This practice has become well established in the industry, and some teams continue to mandate higher rates for commercial subscribers in their rights agreements with ARC.

Second, unlike residential subscribers, commercial establishments use ARC's programming, particularly its cover-

age of local professional sports events, to attract more customers, thereby increasing their revenues. ARC's programming provides entertainment for patrons, similar to live music or disc jockeys, and often is advertised by such establishments to "draw" more customers. Thus, a commercial subscriber receives value from ARC's programming services above and beyond the value received by a residential subscriber and should be required to compensate ARC for that added value.

Third, unlike residential subscribers, commercial establishments allow large numbers of individuals to view ARC's programming services, and ARC has no other way to receive compensation from those individuals. For example, higher commercial rates enable ARC to compensate in part for revenues lost when potential subscribers choose to view ARC's programming at the neighborhood sports bar rather than subscribe to the service themselves. In this sense, ARC's interest is similar to that of professional sports teams seeking to protect the "gate" for their home games.

Finally, ARC has found significant instances of signal piracy among commercial establishments receiving its signal through cable and home satellite dishes. Keeping track of commercial accounts separately helps to minimize the incidence of theft.

In short, these differences between commercial and residential subscribers to ARC's programming services require that ARC charge higher license fees for commercial subscribers

regardless of the means by which those subscribers receive the programming. The Commission should recognize the marketplace differences between residential and commercial customers and permit appropriate differences in cable rates between those two classifications.

B. Other Programming "Distributors" Distinguish Between Residential And Commercial Customers.

The reasonableness of charging higher rates to commercial cable subscribers is demonstrated by the fact that other programming providers operating in a competitive environment engage in the same practices. For example, the National Football League recently announced that it will begin scrambling its "backhaul" and "affiliate" satellite feeds, but will make those feeds available to HSD subscribers for a fee. The fee for a "full season, all-game package" for residential subscribers is reported to range from $99 to $139 for the coming NFL season. However, the fee for commercial entities subscribing to the same program package is based on a sliding scale depending upon the size of the commercial establishment and is reported to range from $699 to $2,500 for the season. See USA Today, Apr. 12, 1994, at C-1. ESPN recently announced a similar rate structure for satellite distribution of "out-of-market" college football games to commercial establishments. See Warren's Cable Regulation Monitor, June 27, 1994, at 13. Thus, the NFL and ESPN rate structures for commercial

establishments receiving their scrambled programming packages via HSD are substantially similar to ARC's commercial rate structure based on the Estimated Viewing Area of each establishment.

Similarly, Liberty Satellite Sports ("LSS"), a separate division of ARC, markets programming packages to HSD owners, including packages containing ARC's regional sports programming services. LSS competes with numerous other program packagers serving HSD owners. See Satellite Orbit, June 1994. Nevertheless, LSS maintains a separate marketing department for commercial sales and uniformly charges commercial establishments higher rates than residential HSD subscribers.

C. Longstanding Copyright Law Similarly Distinguishes Between Private And Commercial Performances.

The Copyright Act also distinguishes between private performances of copyrighted works and "for profit" performances or displays of such works "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." 17 U.S.C. §101. Copyright liability attaches to public performances at bars, restaurants and other commercial establishments, even if no "money is taken at the door" to pay separately for viewing the performance, because the performance is part of their "for profit" operation:

> The...performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. ... If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

Herbert v. Shanley Co., 242 U.S. 591, 594-95 (1917); see also Chappel & Co. v. Middletown Farmers Market & Auction Co., 334 F.2d 303, 306 (3d Cir. 1964) ("Atmosphere created by the playing of recordings made shopping...more pleasurable and attractive to the patrons" of a shopping mall, conveying a commercial benefit sufficient to give rise to copyright liability); U.S. Songs, Inc. v. Downside Lenox, Inc., 771 F. Supp. 1220, 1225 (N.D. Ga. 1991) (receipt and retransmission of radio signals to restaurant patrons via loudspeakers was "public performance" giving rise to copyright liability); Lerner v. Club Wander In, Inc., 174 F. Supp. 731, 732 (D. Mass. 1959) ("performance of copyrighted material in connection with the selling of drinks is a performance for profit"); Buck v. Jewell LaSalle Realty Co., 51 F.2d 726, 729 (8th Cir. 1931) (receipt and retransmission of radio signals to hotel patrons is a public performance for profit).

Thus, the Copyright Act recognizes that commercial establishments using licensed material to further their for-profit operations receive significantly greater benefits than residential customers -- benefits for which they should be

required to pay more. Higher cable rates for commercial subscribers reflect the same marketplace realities.

II. The 1992 Cable Act Permits Reasonable Differences In Rates Charged To Different Classes of Customers.

ARC respectfully submits that, in addition to ignoring these fundamental marketplace differences, the Commission's tentative conclusion regarding commercial rates is inconsistent with the 1992 Cable Act. Although the 1992 Cable Act and its legislative history do not "evince an intent" that commercial subscribers necessarily should pay higher cable rates, the Commission specifically has determined that the "uniform rate" requirement of Section 3(d) of the 1992 Cable Act "does not prohibit the establishment by cable operators of reasonable categories of service and customers with separate rates and terms and conditions of service within a franchise area." See 47 C.F.R. §76.984(b). Likewise, the legislative history of the 1992 Cable Act clearly indicates that Congress did not intend "to replicate Title II regulation" for cable rates. See Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 628, 102d Cong., 2d Sess. 83 (1992). Nevertheless, even common carriers regulated under Title II of the Communications Act are permitted to establish different rates for different classes of customers, provided that such classifications are reasonable. See 47 U.S.C. §202(a).

A. Uniform Treatment Of Commercial And Residential Subscribers Undermines Other Objectives Of The Cable Act.

Commercial cable subscribers represent a reasonable customer classification. As set forth above, professional teams and/or regional sports programming services traditionally have charged higher commercial fees to cable operators and other distributors. Consequently, the Commission's implicit assumption that the difference between commercial and residential rates represents "earnings" to the cable operator is inaccurate. Rather, by prohibiting a cable operator from charging higher rates to these commercial establishments, the Commission effectively would require the cable operator to absorb the additional programming costs incurred in order to serve those establishments. As a result, cable operators essentially would be forced to subsidize the for-profit operations of numerous commercial entities, including bars, restaurants, and hotels.

Such an approach also would undermine other important objectives of the 1992 Cable Act. Because ARC charges higher commercial license fees to cable operators, Commission regulations requiring a cable operator to charge uniform rates to residential and commercial subscribers would force cable operators to increase residential subscriber rates for regional sports programming services, decreasing the likelihood of their carriage on regulated service tiers. Thus, basic cable subscribers would be deprived of the locally

originated sports programming featured on ARC's regional programming services. The 1992 Cable Act clearly sought to avoid such meddling in the programming marketplace, particularly where it is likely to lead to a reduction in the diversity of programming available to viewers. See Cable Television Consumer Protection Act of 1991, S. Rep. No. 92, 102d Cong., 1st Sess. 19 (1991) ("The Committee has no desire to regulate programming"). Like cable operators, residential subscribers should not be required to subsidize the business operations of commercial cable subscribers.

A rule prohibiting cable operators from charging higher rates to commercial subscribers may have unintended adverse consequences for alternative distribution technologies as well. Commercial establishments such as hotels, restaurants and bars generally have a ready alternative to cable in the form of home satellite dishes. Local zoning requirements ordinarily present fewer obstacles to commercial establishments desiring to receive programming via satellite rather than cable. Consequently, if cable rates are too high, such establishments will simply turn to the "effective competition" offered by satellite dishes. However, if Commission regulation mandates that commercial cable rates be no higher than residential rates, commercial establishments will have no incentive to subscribe to alternative distribution technologies which are not subject to such regulation. Thus, the Commission's current approach to commercial rates could sig-

nificantly discourage commercial subscription to other distribution technologies.

B. There Is No Record Support For Requiring Uniform Rates For Residential And Commercial Customers.

Congress and the Commission identified the primary purpose of rate regulation under the 1992 Cable Act as protecting residential cable subscribers from non-competitive cable rates. The rate provisions of the Act apply only to systems that are not subject to "effective competition" -- which is defined under the Act solely in terms of the number of "households" which subscribe to cable and/or have other available multichannel video distribution alternatives. See 47 U.S.C. §543(a)(2), (l). There is nothing in the Act or the legislative history to suggest that commercial cable subscribers, which generally have ready access to satellite programming via HSD service as an alternative to cable, require similar regulatory protection. To the contrary, the Commission has stated explicitly that the "discrimination" prohibited under Section 543(e) does not include the establishment of "reasonable categories of subscribers based on justifiable differences in the economic benefits the operator derives from serving such categories." Report and Order, 8 FCC Rcd. 5631 (1993), at ¶431.

Moreover, there is no reasonable basis for a Commission regulation mandating equal residential and commercial

rates. The surveys relied upon by the Commission in formulating its rate regulations did not solicit specific data regarding the commercial rates charged by "competitive" or other cable systems. See Federal Communications Commission, "FCC Cable TV Rate Survey Database -- Structure of Database And Explanatory Notes," Feb. 24, 1993; Cable Services Bureau, Federal Communications Commission, "FCC Cable Regulation Impact Survey, Changes In Cable Television Rates Between April 5, 1993 - September 1, 1993, Report and Summary," Feb. 22, 1994. Thus, the record contains no information which could support a Commission decision to prohibit higher commercial rates. Instead, the evidence indicates that: (a) programmers such as ARC require higher license fees for distribution of their programming to commercial establishments regardless of the distribution technology involved; (b) other distributors of satellite programming have adopted separate rate structures for commercial accounts; and (c) other licensing arrangements, including the Copyright Act, explicitly distinguish between residential and commercial uses of licensed material.

Conclusion

Commission regulations which would require uniform rates for commercial and residential cable subscribers essentially would require cable operators and residential customers to underwrite the for-profit operations of hotels, restau-

rants, sports bars and other commercial establishments. The 1992 Cable Act clearly does not require such rate uniformity, which would ignore significant marketplace differences between the two customer classifications. The Commission should not require uniform residential and commercial cable rates and should expressly permit cable operators to charge higher rates to commercial establishments to reflect the higher fees imposed by programming services for commercial distribution as well as the lost subscriptions and revenues from public display of the services.

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Respectfully submitted,

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